Supreme Court, U.S.
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No. 02-1320

IN THE

Supreme Court of the United States

MIRROR IMAGE INTERNET, INC., XCELERA, INC., ALEXANDER M. VIK, GUSTAV VIK, and HANS MAGNUS FAJERSON,

Petitioners,

v.

PARFI HOLDING AB, PLENTEOUS CORPORATION, GRANDSEN, LTD., and GUNNAR GILLBERG

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Delaware Supreme Court's determination that, under Delaware law, a broadly drafted arbitration clause did not require arbitration of the specific fiduciary duty and corporate opportunity claims at issue implicates and is inconsistent with the Federal Arbitration Act, where the court's decision was based on the fact that:

(a) the contract at issue did not establish rights and obligations extensive enough to encompass the dispute;

(b) the claims at issue did not bear on duties and obligations under the contract; and

(c) the claims at issue did not, in any way, implicate the contract, but rather rested on independent rights provided by Delaware corporate law.

RULE 29.6 STATEMENT

Respondent, Parfi Holding AB, has no parent company and is a public company under Swedish law. Petitioner, Xcelera, Inc., which is publicly traded on the American Stock Exchange, owns approximately 15% of Parfi Holding AB. Respondents, Plenteous Corporation and Grandsen Ltd., have no parent companies and no publicly held company owns 10% or more of the stock of either such corporation.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of Jurisdiction	1
I. Statement of the Case	1
II. Statement of Facts	2
III. Reasons for Denying the Petition	6
A. This Court Lacks Jurisdiction Over The Appeal	7
1. The Petitioners Did Not Timely Raise The Federal Question	7
2. The Delaware Supreme Court Decision Is Neither Unexpected Nor A Departure From Established Delaware Law	11
3. This Court Does Not Have Jurisdiction Under The Fourth Cox Factor	12

Contents

Page

B. The Delaware Supreme Court Decision Is Consistent With This Court's Approach To Interpreting The Scope of Arbitration Clauses 16

C. The Delaware Decision Does Not Exempt Fiduciary Duty Claims From Arbitration 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996) 20

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643 (1986) 18

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) 11

Citizens Nat'l Bank v. Durr, 257 U.S. 99 (1921) 8, 9

Collins & Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16 (2d Cir. 1995) 19

Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 326 (1913) 8, 9

Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511 (10th Cir. 1995) 18

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7, 9, 10, 12, 13

D.J. Mfg. Corp. v. Tex-Shield, Inc., 998 F. Supp 140 (D.P.R. 1998) 20

Cited Authorities

Page

Dean Whittier Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 21

Doctor's Assoc., Inc. v. Casarotto,
517 U.S. 681 (1996) 14

Eddings v. Oklahoma,
455 U.S. 104 (1982) 10, 11

Forbes v. State Council,
216 U.S. 396 (1910) 9

Ford v. Nylcare Health Plans,
141 F.3d 243 (5th Cir. 1998) 14, 20

Fullerton v. Texas,
196 U.S. 192 (1905) 8

Genesco, Inc. v. T. Kativchi & Co.,
815 F.2d 840 (2d Cir. 1987) 19

Herndon v. Georgia,
295 U.S. 441 (1935) 8, 11

Hersman Inc. v. Fleming Cos.,
19 F. Supp. 2d 1282 (M.D. Ala. 1998) 18, 19

Illinois Cent. R.R. Co. v. Kentucky,
218 U.S. 551 (1910) 9

Cited Authorities

Page

Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218 (2d Cir. 2001) 19

McCorquodale v. Texas, 211 U.S. 432 (1908) 8, 9

Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930) 8, 9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) 14, 17, 18

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 11

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8

Rodriquez de Quijas v. Shearson-Lehman American Express, Inc., 490 U.S. 477 (1989) 14

Sharja L.P. v. Choice Hotels Int'l, Inc., No. Civ. A. 3:01-CV-2605-X, 2002 WL 107171 (N.D. Tex. Jan. 22, 2002) 20

Shearson/American Express v. McMahon, 482 U.S. 220 (1987) 15

Page

Simula, Inc. v. Autoliv, Inc.,
175 F.3d 716 (9th Cir. 1999) 19
Southland Corp. v. Keating,
465 U.S. 1 (1984) 12, 13, 14

Volt Info. Sciences, Inc. v. Board of Trustees,
489 U.S. 468 (1989) 14

STATE CASES

Bass v. SMG, Inc.,
765 N.E.2d 1079 (Ill. App. Ct. 2002) 20

Breaker v. Corrosion Control Corp.,
23 P.3d 1278 (Colo. App. 2001) 20

Elf Atochem N. Am. v. Jaffari, Inc.,
727 A.2d 286 (Del. 1999) 11

SBC Interactive Inc. v. Corporate Media Partners,
714 A.2d 758 (Del. 1998) 11

Wilmington Trust Co. v. Conner,
415 A.2d 773 (Del. 1980) 6

X.L. Ins. Co. v. Hartford Accident & Indem. Co.,
918 S.W.2d 687 (Texas App. 1996) 20

Cited Authorities

Page

UNITED STATES CONSTITUTION

First Amendment 9

FEDERAL STATUTES

28 U.S.C. § 1257(a) 1, 7, 12

Federal Arbitration Act, 9 U.S.C. § 1, *et seq* 6

RULES

U.S. Supreme Court Rule 10 ..... 15, 17

STATEMENT OF JURISDICTION

The Respondents contest the Petitioners' assertion of jurisdiction. The Federal question presented by this petition was not raised in a timely fashion before the Delaware Supreme Court, was not passed on by that court, and the court's order does not constitute a final order pursuant to 28 U.S.C. § 1257(a).

I. STATEMENT OF THE CASE

Contrary to Petitioners' "Statement," this case neither presents a question of "broad importance to the enforceability of arbitration clauses under the Federal Arbitration Act," nor involves interpretive principles at odds with "this Court's jurisprudence interpreting and applying the FAA." Rather, this case involves the Delaware Supreme Court applying Delaware state law principles of contract construction to interpret the scope of an arbitration clause. Indeed, prior to Petitioners filing their Motion For Reargument, Petitioners advocated the application of Delaware state law to the exclusion of any law that may be applicable in other jurisdictions, including Federal jurisprudence under the FAA. In any event, the contract principles applied by the Delaware Supreme Court are fully consistent with the legal principles utilized under the FAA as well as that of sister states.

At its heart, what the Delaware Supreme Court held was that the scope of an arbitration clause is not determined in a vacuum; rather, interpretative principles require that the subject matter of the entire agreement be considered in order to determine the nature of the claims that the parties consensually agreed to submit to arbitration. Where, as in this case, the parties entered into an agreement of limited

subject matter (i.e., a one-time capital raising event), the arbitration clause, though broadly drafted, did not encompass fiduciary duty and corporate opportunity claims that sprang solely from the status of the parties as shareholders and/or directors of a Delaware corporation. Because the claims in the litigation depended neither on any substantive provision of the agreement containing the arbitration clause, nor required interpretation of any provision of the agreement in order to determine any parties' rights or obligations, the Delaware Supreme Court held that the litigation claims were not claims that the parties had consensually agreed to arbitrate.

Independent of these facts is the issue of this Court's lack of jurisdiction to accept this appeal. The Federal issue was raised only in a Motion For Reargument following the Delaware Supreme Court's ruling and the court's denial of that motion without opinion. Moreover, because state law principles of contract construction were applied at the urging of all parties, no Federal policy is threatened by the ruling. Lastly, the decision cannot be characterized as either unexpected or a departure from prior law. There simply is no basis for jurisdiction.

II. STATEMENT OF FACTS

The Delaware litigation involves the allegations of breaches of fiduciary duty and misappropriation of corporate opportunity stemming from certain actions taken by Xcelera, Inc. ("Xcelera") as majority shareholder, and Alexander and Gustav Vik and Hans Magnus Fajerson (the "Individual Defendants") who sat as directors of both Mirror Image Internet, Inc. ("Mirror Image") and Xcelera. (App. 4-5). Contrary to the opening sentence of Petitioners' factual

recitation, this case does not involve "a contract among" the parties. There was a contract between the parties; but that contract, the Underwriting Agreement, dealt principally with a singular event – the raising of $2MM in capital and the reapportionment of shareholding interests in Mirror Image as a result. (App. 14-15).[1] While that contract did contain a broad arbitration clause, had nothing to do with corporate governance or the on-going relationship between the shareholders and/or the directors of Mirror Image. The underlying litigation is not based on that contract.

Rather, in the months that followed the parties' execution of the Underwriting Agreement, Xcelera and the Individual Defendants engaged in four transactions that the Respondents assert violated canons of Delaware corporate law. The first three transactions (denoted as the April and July transactions and the November preferred stock offering) involved the issuance of "watered-down" stock to Xcelera and the concomitant unfair dilution of the minority shareholders' interests in Mirror Image. (App. 4-5). Each of these transactions amounted to a breach of the fiduciary duty owed by both the directors to the minority shareholders and the majority shareholder to the minority. The fourth transaction involved the misappropriation of a corporate opportunity by Xcelera. Specifically, in the winter of 2000, an independent corporation, Exodus Communications, Inc. ("Exodus"), expressed an interest in making a multi-million dollar investment into Mirror Image. At a time when Mirror Image was still a start-up company that had yet to achieve operational profitability and desperately needed the money to implement its ambitious business plan, Xcelera and the Individual Defendants structured the transaction such that

1. The Underwriting Agreement also created certain rights to appoint directors (App. 15).

75% of the Exodus "investment" was received directly by Xcelera, not Mirror Image. (App. 5).

None of these causes of action implicates the Underwriting Agreement in any way. None requires an interpretation of any provisions of that agreement. None of the duties or obligations alleged to have been violated exists because of that agreement.

It is the case that the Underwriting Agreement contained an arbitration clause pursuant to which any claim "arising out of or in connection with the Agreement or the breach, termination or invalidity thereof" was committed to arbitration in Sweden. (App. 104, § 20.2). It is also the case that an arbitration proceeding was commenced in Sweden approximately six months prior to the filing of the Delaware Complaint, and that a subsequent hearing was held concerning those claims. (App. 6-7). The arbitration claims alleged fraud in the inducement (i.e., under Swedish law: failure of assumption) and breach of contract. In part, those proceedings involved an evaluation of the same four transactions to determine whether they provided circumstantial evidence of Xcelera's fraudulent intent as of the earlier date of negotiation and execution of the Underwriting Agreement. The four transactions were also evaluated to determine if they constituted "corporate action" within the meaning of a side-letter agreement between Xcelera and Plenteous Corporation.[2] (App. 16-17). Following the hearing, the arbitration tribunal ("Tribunal") expressly stated that its evaluation of those transactions did not implicate stockholder rights under Delaware law. (App. 6-7 & 15-16).

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2. Plenteous was an underwriter pursuant to the Underwriting Agreement. Plenteous is also a minority shareholder and a plaintiff in the Delaware state court litigation.

What lay at the base of the dispute between the parties regarding arbitrability, and the point of disagreement between the Delaware Chancery and Supreme Courts, was whether, in the face of a broadly drafted arbitration clause, discrete claims emanating from a partially common core of facts could result in both arbitrable and nonarbitrable claims in light of the scope of the subject matter of the agreement containing the arbitration clause. In evaluating whether the claims at issue were arbitrable, the Delaware Supreme Court stated that because the arbitration clause was broad in scope, it would "defer to arbitration on any issues that touch on contract rights or contract performance." (App. 10). Thus, the issue as framed by the Delaware Supreme Court was whether the fiduciary duty claims or corporate opportunity claims "implicate any of the rights and obligations provided for in the Underwriting Agreement." (*Id.* at 11). To answer this question, the Delaware Supreme Court analyzed all of the provisions of the Underwriting Agreement to see what rights and obligations were created. (*Id.* at 12-15). Finding that the Underwriting Agreement pertained only to "the rights related to the initial offering of Mirror Image Stock," (App. 18), the court held that the Underwriting Agreement did "not establish rights and obligations extensive enough to encompass" the fiduciary duty and corporate opportunity claims at issue in the litigation. The court stated:

> While some agreements, by their nature, extend so far as to mandate arbitration for breach of fiduciary duty claims, the Underwriting Agreement here did not.

(App. 19).

Following the Delaware Supreme Court's decision, the Petitioners filed a Motion For Reargument, raising for the first time the assertion that the "Opinion adopted a policy concerning arbitration agreements that conflicts with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA")." (App. 70). In opposition, Respondents argued that the assertion of inconsistency came too late in the proceeding and was thus dismissible on that ground alone. (App. 76-77) (*citing Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980)). Thereafter, in a one page order, the Delaware Supreme Court denied Petitioners' motion saying only that: "(3) The Court has carefully considered the motion for reargument and the answer, and concludes that the motion should be denied." (App. 69). This petition followed.

III. REASONS FOR DENYING THE PETITION

There are two reasons why this Court should deny the Petition for Writ of Certiorari. First, this Court plainly lacks jurisdiction. The Federal question was not timely raised nor expressly ruled on by the Delaware Supreme Court. No substantial Federal policy is implicated, let alone threatened, by the Delaware Court's decision because that decision was based on Delaware state law that all parties argued was controlling. The Delaware Court's decision also does not represent a departure from pre-existing Delaware law or an unanticipated result that first implicated the Federal question. Second, the Delaware Supreme Court's decision is entirely consistent with both precedent from this Court and decisions from myriad Federal circuit and district courts, we well as other state courts.

A. This Court Lacks Jurisdiction Over The Appeal

The Petitioners concede that they never argued the applicability of the FAA either before the trial court or during the briefing or arguing of the appeal.[3] It was only after receiving an adverse decision that Petitioners filed a motion to reargue raising alleged inconsistency between the Delaware Supreme Court's application of state law principles of contract construction with those principles as applied under the FAA.

The Petitioners advance three reasons why their belated filing vests this Court with jurisdiction. First, Petitioners say the late filing was timely because the Delaware Supreme Court considered the Federal issue raised. Next, Petitioner asserts that the Delaware Supreme Court decision was both unexpected and a departure from established Delaware State law and they thus raised the Federal issue at the first opportunity. Third, they argue that the fourth of the so-called *Cox*[4] factors renders that late considered filing a final judgment under 28 U.S.C. § 1257. None of the reasons afford jurisdiction on the facts of this case.

1. The Petitioners Did Not Timely Raise The Federal Question

Petitioners' assertion that the raising of a Federal question on a motion for reargument following an adverse appellate decision is timely if that court considers it is fine as far as it goes. The problem for Petitioners is that the

3. In fact, there were two oral arguments on appeal – once before a three judge panel; and once before the entire five judge panel.

4. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Delaware Supreme Court did not consider the Federal question in the manner prescribed by this Court's jurisprudence. This Court has long held "that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after the court has pronounced its final decision." *McCorquodale v. Texas*, 211 U.S. 432, 437 (1908); *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945) (same); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (same); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) (same); *Citizens Nat'l Bank v. Durr*, 257 U.S. 99, 106 (1921) (same); *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 326, 334 (1913) (same). One exception to this rule is where the state court actually entertains and considers the late raised Federal question. *E.g.*, *McCorquodale*, 211 U.S. at 437 ("if the court entertains the motion and passes on the Federal question, we will review its decision"). Although petitioners assert this is what has happened, a review of the Delaware court's denial of that motion under this Court's precedent establishes that it did not. The Delaware Supreme Court denied the Petitioners' Motion for Reargument as follows: "(3) The Court has carefully considered the motion for reargument and the answer, and concludes that the motion should be denied." (App. 69). As can be readily seen, the Delaware Supreme Court gave no indication that it evaluated the Federal question and disposed of it on its merits. From the record, it is just as likely that the court disposed of the motion as untimely, one of the bases argued by Respondents in their answer to the motion. (App. 76-77). *See Fullerton v. Texas*, 196 U.S. 192, 194 (1905) (where court denies petition without expressly addressing Federal question, a reasonable inference is that the court simply refused to pass on the Federal question because it was raised too late). This type of disposition has been repeatedly found to be insufficient to

confer jurisdiction on this Court. For example, in *McCorquodale*, this Court held that the state court's order denying a motion for rehearing did not show that it had decided the Federal question even though that order stated that the "appellant's motion" was "considered by the court." *McCorquodale*, 211 U.S. at 437. Similarly, in *Forbes v. State Council*, 216 U.S. 396, 399 (1910), this Court found that a state court's order stating that the motion for rehearing was denied after "mature consideration" was insufficient to establish that the court had in fact decided the Federal question. *See also Citizens Nat'l Bank*, 257 U.S. at 106 (where petition denied "without reasons given," jurisdiction does not exist); *Missouri ex rel. Missouri Ins. Co.*, 281 U.S. at 320 ("Ordinarily [the Supreme Court] will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more."); *Consolidated Turnpike*, 228 U.S. at 333-34 (court found that the "words 'maturely considered' do not import any decision of the question made.").

Where jurisdiction has been found, it has been because the state court rendered an opinion clearly and expressly addressing the Federal question. For example, in *Illinois Cent. R.R. Co. v. Kentucky*, 218 U.S. 551, 556 (1910), this Court found jurisdiction because the state court had "extended its opinion, holding that no right of the appellant under the Fourteenth Amendment had been violated by the decision."

The Petitioners' reliance on *Cox Broadcasting*, actually undercuts them. In *Cox*, this Court found jurisdiction precisely because the Georgia Supreme Court specifically addressed the First Amendment issue in its denial of the motion for rehearing. The Georgia court expressly stated:

"A majority of this court does not consider this statute to be in conflict with the First Amendment." 420 U.S. at 476. On review, this Court stated:

> Since the court relied upon the statute as a declaration of the public policy of Georgia that the disclosure of a rape victim's name was not to be protected expression, the statute was drawn in question in a manner directly bearing upon the merits of the action, and the decision in favor of its constitutional validity invokes this Court's appellate jurisdiction.

Id. The case of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), is not to the contrary, and Petitioners' reliance on it is misplaced. *Eddings* involved a different jurisdictional exception: that is, where a petition for rehearing is the first opportunity to raise the Federal question due to an unexpected decision or departure for pre-existing precedent. *Id.* at 113 n.9. In such circumstances, jurisdiction will exist even where the state court denies the petition without opinion. (*See* argument *infra* at III.A.2).

As this Court's precedents thus make clear, for a motion for rehearing to timely raise a Federal issue such that this Court has appellate jurisdiction, the state court of last resort must expressly address the Federal issue in its disposition of that motion. A simple denial without more is insufficient to establish jurisdiction.

2. The Delaware Supreme Court Decision Is Neither Unexpected Nor A Departure From Established Delaware Law

Petitioners also argue that because the Delaware Supreme Court's decision was, in the words of that court, a "case of first impression," the court's decision was either an unexpected interpretation of state law or a reversal of that court's prior interpretation of the law such that the Federal rights were first implicated by the decision. (Pet. Br. at 26). *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 86-87 & n.9 (1980). If such a circumstance truly exists, raising the issue for the first time in a motion for rehearing is apparently timely even where the motion is denied without opinion. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). The question thus becomes "whether the ruling here assailed should have been anticipated," *Herndon*, 295 U.S. at 444, or whether there was a departure from pre-existing decisions. *Eddings*, 455 U.S. at 113 n.9. Here, the Petitioners cannot make the necessary showing that the decision was either unanticipated or a reversal of prior state law. As to the latter, the court stated that this was a case of first impression. Moreover, there is nothing in the Delaware Court's earlier decisions that is contrary. In both *Elf Atochem N. Am. v. Jaffari, Inc.*, 727 A.2d 286 (Del. 1999), and *SBC Interactive Inc. v. Corporate Media Partners*, 714 A.2d 758 (Del. 1998), the Delaware Supreme Court affirmed findings that all claims at issue were arbitrable, specifically because the agreements at hand were corporate governance documents that broadly covered the entire relationship between the parties, and the claims at issue implicated those agreements. *See SBC Interactive*, 714 A.2d at 759-760; *Elf Atochem*, 727 A.2d at 287, 295. In fact, in finding the claims in this case nonarbitrable, the court cited to *Elf Atochem* as an example of an agreement that, "by its

nature, extended" "so far as to mandate arbitration of breach of fiduciary duty claims." (App. 19 & n.42).

The decision also can not be fairly characterized as an unexpected interpretation of state law both because there is no contrary Delaware law in existence and the court expressly noted that a number of courts from other jurisdictions adopted the test articulated by the court in its opinion. (App. 10 n.15). Accordingly, jurisdiction is not proper under this exception.

3. This Court Does Not Have Jurisdiction Under The Fourth Cox Factor

Even if this Court were to rule that the Federal question was timely raised and expressly considered by the Delaware Supreme Court, jurisdiction would still be lacking because the state court decision is not a final order as required by 28 U.S.C. § 1257, and the fourth *Cox* factor is inapplicable. Under the fourth *Cox* factor, this Court may review a non-final state court decision "where the Federal issue has been finally decided in the state courts with further proceedings pending that could result in the party seeking review prevailing on non-Federal grounds and the failure to immediately review the state-court decision might seriously erode Federal policy." *Cox*, 420 U.S. at 483. This Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), however, establishes that jurisdiction is improper under this exception because the Delaware Supreme Court decision does not threaten to seriously erode Federal policy.

In *Southland*, this Court addressed two separate issues under the fourth *Cox* factor arising out of the California Supreme Court's ruling concerning the arbitrability of certain

statutory claims under a contract whose arbitration clause was governed by the FAA. With regard to the California court's holding that state franchise law rendered the claims arising under the contract nonarbitrable, this Court found the fourth *Cox* factor applicable because absent immediate review "there would remain in effect an unreviewed decision of the state" that in effect held that the California statute invalidating an agreement to arbitrate did not conflict with the FAA. This nullification or invalidation threatened to seriously erode the Federal policy manifest in the FAA to enforce contacts to arbitrate. 465 U.S. at 7.

As to the second issue, however, this Court found no jurisdiction because Federal policy was not implicated. The second issue concerned the California court's decision superimposing state class-action procedures on the arbitration proceedings. Throughout the state court proceedings, Southland argued that state law prohibited arbitrations from proceeding as class actions and that the Federal Rules of Civil Procedure did not apply. In keeping with the parties' arguments, the California court ruled that a class action structure for arbitration was permitted under state law. *Id.* at 9 n.4. Because Southland did not challenge the validity of the state statute on Federal grounds, there was no threat to Federal policy and this Court lacked jurisdiction to hear the appeal. *Id.* at 9.

Southland is controlling here. Throughout these proceedings, Petitioners' proceeded under the premise that Delaware State law governed the determination of the scope of the arbitration clause. In fact, at the trial court level, the Vice Chancellor stated that "all parties have argued this aspect of the motion under the assumption that Delaware law governs the question of whether Parfi's claim is arbitrable. . . . In keeping with the parties' choice, I therefore apply the settled principles

of Delaware law . . .". (App. 36-37). Similarly, the Delaware Supreme Court ruled that this was "a case of first impression in Delaware." (App. 10). In short, the determination of whether the particular claims at issue were arbitrable was decided (by choice of the parties) under state law as opposed to Federal law. Thus, even if the decision could be characterized as inconsistent with Federal policy, which it cannot, no threat to Federal policy can be found. This Court so ruled in *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989). In *Volt*, although the contract at issue was clearly covered by the FAA, the Court found that the parties had "agreed to arbitrate in accordance with California law." *Id.* at 477. Analyzing the policy goals underlying the FAA, the Court stated that while the FAA preempted any state law mandating a judicial forum for claims otherwise agreed to by the parties to be arbitrated, it did not follow that the FAA prevented the enforcement of the parties' agreement to arbitrate under different rules from those provided by the FAA. *Id.* at 478-479. Thus, under this Court's holding in *Volt*, the parties are free to select state law as governing the scope of their agreement to arbitrate even where the contract otherwise falls within the FAA. *See, e.g., Ford v. Nylcare Health Plans*, 141 F.3d 243, 248 & n.6 (5th Cir. 1998) (parties are free to select state law to govern the scope of their agreement to arbitrate). In arguing for the application of state law throughout these proceedings, the parties have agreed that state law should control the interpretation of the scope of the arbitration clause.

Moreover, unlike the first issue in *Southland*, or the other cases cited by Petitioners such as *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Rodriquez de Quijas v. Shearson-Lehman American Express, Inc.*, 490

U.S. 477 (1989); and *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); the Delaware decision does not serve to invalidate the arbitration clause at issue or declare any particular category of claims nonarbitrable. *See* argument *infra* at III.C. Rather, the Delaware decision simply applied routine state law principles of contract construction to determine whether the contract at hand, including the arbitration clause contained therein, subjected the particular claims at issue to arbitration. Ironically, in so doing, the Delaware court expressly relied on a variety of cases from other jurisdictions, including cases decided under the FAA, as analogous support for the result reached. (App. 10 n.15, 13 n.24, 16 n.27). Even more ironically, Petitioners originally argued below that the Federal cases relied on by Respondents were inapposite, expressly because only Delaware state law was relevant.[5] (App. 77).

In sum, because Petitioners argued below that state law controlled the interpretation of the scope of the arbitration clause, and the Delaware Supreme Court so decided, no threat to an important Federal policy is implicated and this Court does not have jurisdiction to hear this appeal.

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5. Even if one could argue that in relying on the Federal cases for analogous support the Delaware Court misapplied correctly articulated Federal interpretive principles, no Federal policy would be implicated sufficient to invoke jurisdiction. Supreme Court Rule 10 expressly states that: "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings *or the misapplication of a properly stated rule of law.*" Sup. Ct. R. 10 (emphasis added).

B. The Delaware Supreme Court Decision Is Consistent With This Court's Approach To Interpreting The Scope of Arbitration Clauses

Jurisdiction aside, this Court should refuse the Petition because the Delaware Supreme Court applied principles entirely consistent with this Court's precedent. The Delaware Supreme Court ruled that an "arbitration clause, no matter how broadly construed, can extend only so far as the series of obligations set forward in the underlying agreement. Thus, the arbitration clause should be applied only to claims that bear on the duties and obligations under the Agreement." (App. 11-12). In other words, the court held that the arbitration clause is not viewed in a vacuum. Rather, it is considered in the context of the contract at issue: that is, what is the subject matter of the contract and how do the claims at issue relate to that subject matter. Looking through that lens, the Delaware Court saw that even though broadly drafted, the arbitration clause "signals only an intent to arbitrate matters that touch on the rights and performance related to the contract." (App. 12). In order to determine whether the claims at issue "touched on" such rights, the Delaware court asked whether those claims stood entirely independent of the contract. Put differently, did the claims implicate rights arising out of the contract or was interpretation of any provision of the contract necessary in order to determine liability under the claims. (App. 13-16 & n.24). Ultimately, the Delaware Supreme Court held that under the facts of this case, the "Underwriting Agreement did not established rights and obligations extensive enough to encompass the [fiduciary duty and corporate opportunity] dispute Parfi has brought in the Court of Chancery." (App. 14).

It is this formulation that the Petitioners characterize as in "conflict with this Court's interpretation and application of the FAA."[6] The Petitioners' characterization is wrong. To the contrary, the methodology utilized by the Delaware Supreme Court is entirely consistent with that endorsed by this Court. The decision most directly on point from this Court is *Mitsubishi*. In *Mitsubishi*, the Court was faced with determining whether antitrust claims arising out of an international commercial contract were *per se* nonarbitrable. 473 U.S. at 628. In the process of reviewing the decision of the First Circuit Court of Appeals holding that they were, this Court also discussed the First Circuit's methodology for determining whether the antitrust claims first fell within the scope of the arbitration clause at issue. *Id.* at 622 n.9. Under the First Circuit's analysis, only those antitrust claims that turned on specific substantive provisions of the sales agreement at issue fell within that agreement's arbitration clause. Although this Court expressly stated that given the First Circuit's ultimate holding (i.e., that the antitrust claims arising from the international contract were, as a matter of policy, nonarbitrable), "[w]e therefore have no reason to review the Court of Appeals' construction of the scope of the arbitration clause . . . ," *id.* at 625 n.13, it went on to state that "insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles

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6. U.S. Supreme Court Rule 10 states that "a petition for certiorari will be granted only for compelling reasons." By way of example, Rule 10 states that such a reason may exist where:

> (c) a state court . . . has decided . . . an important Federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10(c).

[of the Sales Agreement], the Court of Appeals properly resolved any doubts in favor of arbitrability." *Id.* In other words, this Court approved the First Circuit's approach to arbitrability: determine whether the claims, statutory or otherwise, were grounded in some way in the provisions of the contract that contained the arbitration clause. While this Court's comments in *Mitsubishi* are plainly dicta, Federal courts throughout this country have repeatedly applied the same analysis as the First Circuit in determining the proper scope of an arbitration clause.

For example, the Tenth Circuit Court of Appeals in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995), was faced with determining whether the several antitrust claims raised there were subject to arbitration under the parties' agreement. In determining the arbitrability of these series of claims, the court held that only those "claims that have a reasonable factual connection to the contract" containing the arbitration clause were arbitrable. *Id.* at 1516. In the words of the Tenth Circuit, "[a] dispute within the scope of the contract is still a condition precedent to" involuntary arbitration. *Id.* (*citing AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986)).

Similarly, in *Hersman Inc. v. Fleming Cos.*, 19 F. Supp. 2d 1282 (M.D. Ala. 1998), the court stated that:

> [t]he key inquiry in determining whether the tort claims are subject to the arbitration provision is the relationship between the plaintiffs' claims and the contractual obligations.

Id. at 1286. In finding the tort claims there non-arbitrable, the court held that those claims did not implicate performance

of duties under the contract, inquiry of the terms of the contract was not needed, and the contractual relationship was not a necessary predicate for the existence of the claims. *Id.* at 1287.

The same test was applied by the Second Circuit in *Genesco, Inc. v. T. Kativchi & Co.*, 815 F.2d 840 (2d Cir. 1987). There the court found the plaintiff's RICO claim arbitrable because the "wire, mail and transportation fraud allegations which form the predicate acts of Genesco's RICO claim all derive from the parties' transactions under the sale agreements." *Id.* at 848.

More recently, the Second Circuit held again that when a broad arbitration clause exists, arbitration will be ordered only "if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it.'" *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) (quoting *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 23 (2d Cir. 1995)).

The Ninth Circuit also applied the same interpretive analysis in *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999). In *Simula*, the Court stated that the arbitration clause at issue would sweep within its reach all claims that "touch matters covered by the contract containing the arbitration clause . . ." *Id.* at 721. The court then held that the antitrust, Lanham Act and defamation claims were all arbitrable because each either depended on the existence, performance and/or interpretation of the substantive provisions of the contract itself. *Id.* at 721-25.

The Fifth Circuit has applied the same test in analyzing arbitrability under Texas state law.[7] In *Ford*, the court stated that a claim is arbitrable "if it is 'so interwoven with the contract that it could not stand alone, but is not arbitrable if it is completely independent of the contract and could be maintained without reference to a contract.'" 141 F.3d at 250 (*quoting X.L. Ins. Co. v. Hartford Accident & Indem. Co.*, 918 S.W.2d 687, 689 (Texas App. 1996)); *see also D.J. Mfg. Corp. v. Tex-Shield, Inc.*, 998 F. Supp 140, 143-44 (D.P.R. 1998) (arbitration clause "cannot be held to extend to all disputes between those two parties, unless they are somehow linked to the provisions of the contract"); *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93-95 (4th Cir. 1996) (arbitrability of claim depends on the significance of its relationship to the substantive provisions of the contract); *Sharja L.P. v. Choice Hotels Int'l, Inc.*, No. Civ. A. 3:01-CV-2605-X, 2002 WL 107171, at *2 (N.D. Tex. Jan. 22, 2002) (tortious interference claim arbitrable because it depended "as a legal matter, on whether the parties complied with the terms of the Franchise Agreement"). *See also generally Bass v. SMG, Inc.*, 765 N.E.2d 1079, 1089 (Ill. App. Ct. 2002) (to determine if a significant relationship exists between the claim asserted and the contract containing the arbitration clause court must examine the "specific links between the claims alleged and the subject matter of the agreement"); *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278, 1284 (Colo. App. 2001) (claim is arbitrable if "factual basis implicates the rights and obligations created by a particular agreement").

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7. The court held in *Ford* that there was 'no perceptible difference between the federal and Texas standards . . ." for determining arbitrability. 141 F.3d at 250 n.7.

In short, all of these cases examine the subject matter of the contract containing the arbitration clause in order to determine whether the claims at issue implicate that contract in some meaningful way. Does the contract create rights subsequently violated? Does the contract impose obligations that were breached? Can the existing claim only be decided by interpreting specific provisions of the agreement? If the answer to any of these questions is yes, the claim is arbitrable. If, however, the answer to all of them is no, then the claim is not arbitrable. This is the test the Delaware Supreme Court applied when it held that "arbitration clauses should be applied only to claims that bear on the duties and obligations under the Agreement." (App. 12). The fact that the claims shared, in part, a common set of facts was not and is not relevant. *See, e.g., Dean Whittier Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("preeminent concern of Congress in passing the Act was to enforce private agreements . . . to arbitrate, even if the result is 'piecemeal' litigation . . .").

As there is no inconsistency between the state law principles applied by the Delaware Supreme Court and those applied by this Court and the lower Federal courts under the FAA, the Petition should be denied.

C. The Delaware Decision Does Not Exempt Fiduciary Duty Claims From Arbitration

Petitioner's assertion that the Delaware Supreme Court has ruled that corporate fiduciary duty claims are *per se* nonarbitrable is simply wrong. (*See* Pet. Br. at 13-15). In fact, as pointed out in Section III.A.2 above, the Court expressly noted that "some agreements, by their nature extend so far as to mandate arbitration for breach of fiduciary duty claims . . ." (App. 19 & n.42). But under the facts of this

case, it was not to be presupposed, absent clear language to the contrary, that fiduciary duty claims arising out of the status of the parties as majority and minority shareholders of a Delaware corporation, were intended by the parties to be arbitrable where the subject matter of the agreement was otherwise so limited in scope. In other words, the fiduciary duty claims were nonarbitrable because they did not implicate in any way the rights and obligations created by the contract and interpretation of the contract was not necessary in order to resolve the claims. The court did not rule that fiduciary duty claims are inherently nonarbitrable. Thus, this is not a case where a state law or court ruling impermissibly invalidates arbitration as to specified claims. *See* cases cited *supra* at III.A.2.

Moreover, contrary to the Petitioners' assertion, the Delaware court did not rule that all claims that have a legal basis independent of the contract were *per se* nonarbitrable. Rather, after noting that the Delaware Chancery Court properly ruled that the fiduciary duty claims did not arise out of the contract, the court held that the "in connection with" language did not render those claims arbitrable if they would otherwise be assertable if no contract ever existed. (App. 14). In other words, the contract was not necessary in any way for the maintenance of the claims. Again, this is consistent with the interpretive principles the Federal courts have used in construing the scope of arbitration clauses under the FAA.

CONCLUSION

For the reasons set forth above, the Respondents request that the court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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